No. 22,152

IN THE

United States Court of Appeals

For the Ninth Circuit

HOLLY SUGAR CORPORATION,
Appellant,

vs.

DISTILLERY, RECTIFYING, WINE AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, et al.,
Appellees.

On Appeal from an Order of the United States District Court for the Northern District of California

REPLY BRIEF FOR APPELLEES

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STATEMENT OF THE CASE

This case is before the Court as the result of a complaint filed with the Court below by the Appellant, Holly Sugar Corporation, to "vacate, modify or correct an arbitration award" and subsequent cross motions by both the Appellant and Appellees to vacate and confirm the award, respectively. On July 6, 1967, District Judge Lloyd H. Burke, after reviewing the briefs filed by the parties and after hearing oral argument, denied appellant's motion and ordered that the Appellees' motion to confirm the arbitrator's

award be granted. The Court then issued a judgment dismissing the complaint and confirming the Award (R. Vol. 2, p. 148).

The Record before the Court below shows that on July 12, 13, and 29, 1966, arbitration hearings were held before Arbitrator Robert E. Burns, pursuant to the provisions of collective bargaining agreements between the parties. The numerous issues involved in these arbitration proceedings basically concerned the proper work classification and wage rate for one of the appellant's employees named Harold M. Zimmer (hereinafter sometimes referred to as the grievant). Subsequent to the arbitration hearings concurrent and comprehensive opening briefs were filed with the arbitrator by both the appellant herein (sometimes hereinafter called the Employer) and the appellees (sometimes hereinafter called the Union), (R. Vol. 2, p. 12), and equally comprehensive reply briefs followed. Arbitrator Burns rendered his award on January 23, 1967 (R. Vol. 1, p. 47). The Company thereafter submitted to the arbitrator what it termed a "Motion For Vacation of Opinion and Award", to which the Unions responded. On April 3, 1967, the arbitrator rejected the company's contentions and denied its motion (R. Vol. 2, p. 71). The Company's complaint and motion to the United States District Court was filed on April 18, 1967.

The parties involved in this case, together with the Spreckels Sugar Company and the American Crystal Sugar Company, have been involved in a continuous collective bargaining relationship for many years. In

the Spring of every third year their collective bargaining agreement is customarily renegotiated, as it was in 1962 and 1965. The body of the contract between the Unions and the three sugar companies is identical, with variations negotiated concerning certain classifications and certain other minor differences.

The contract language concerning arbitration procedures, and the establishment and posting of new jobs, applies alike to all the companies and unions parties thereto. A permanent panel of arbitrators is established to hear and resolve disputes between the parties. Arbitrator Burns has long been a member of this panel, having been included in the 1962 contract and the 1965 contract.

The instant matter which eventually went before Arbitrator Burns in three days of hearings, hundreds of pages of transcript testimony, and briefed argument, originated on March 3, 1964. The nature of this dispute will be briefly summarized. Harold Zimmer, looking for a job, visited R. B. Scanlon, factory superintendent of the appellant's Brawley, California sugar plant (sometimes referred to as Carlton). (Arb. Tr. p. 28.)[1] Zimmer was a journeyman painter, and it so happened that factory manager Scanlan was at that time looking for a full-time painter. Scanlan had already made up his mind to hire someone solely for painting purposes. He had decided that he could no longer release his employees from their other re-

[1]"Arb. Tr." references herein are to the Arbitration Transcript lodged with the Court as an Exhibit.

sponsibilities for painting purposes (Arb. Tr. p. 29, p. 92).

The Spreckels Sugar Company factories had a painter classification included in the listing of classifications in the 1962 contract. However, Holly Sugar Company factories did not. Nevertheless, the collective bargaining agreement contained provisions for the creation of new jobs and the posting thereof (1962 contract, Section XVII(2), R. Vol. 1, p. 29).

The Holly practice had been, prior to March, 1964, to have the painting work done during "intercampaign", the off season (Arb. Tr. p. 92). Painting work during that time was done by other factory personnel available for such work, and ordinarily not done during the campaign season when sugar beets were being harvested and processed, and the sugar plants were in around the clock operation.

Departing from this practice, Zimmer was hired by Scanlan for the exclusive purpose of painting (Arb. Tr. p. 29). For the next two years Zimmer did nothing but paint (Arb. Tr. pp. 30, 31), during campaign as well as intercampaign.

The Company Superintendent Scanlan never told the Union nor, apparently, his own superiors, that he had a full-time painter (Arb. Tr. p. 118). Even after the succeeding collective bargaining agreement in 1965 was signed, Zimmer's work was charged to various expense accounts other than painting. From Company records there was no way in which it could be determined that Zimmer was, in fact, a full-time painter (Arb. Tr. pp. 102, 176). Moreover, before

Arbitrator Burns Scanlan testified that he "could not recall" whether the job of Mechanic's Helper, the classification technically assigned to Zimmer, had ever been posted as required by Section VIII(G) of the contract (Arb. Tr. p. 116). When Scanlan was asked prior to collective bargaining negotiations in 1965 to submit a list of active classifications he submitted a list but the list did not include a painter, or, indeed, any classification which could identify the fact that Zimmer was assigned exclusively to painting work (Arb. Tr. p. 118).

In the negotiations for the 1965 contract, the Union submitted its new contract proposals including a proposal initiated by the Holly Sugar Company Santa Ana Local Union for a painter classification (Arb. Tr. p. 184). The Santa Ana local had become concerned because beginning in December, 1964, during intercampaign, two men normally assigned to the "Station A" classification had been assigned on a full-time basis to painting responsibilities (Arb. Tr. pp. 184, 185). The Santa Ana proposal sought to add the classification of painter with a "Technician A" rate (Arb. Tr. p. 185), a higher paid classification applicable largely to skilled craftsmen.

A subcommittee of local Union and Company representatives met on March 11, 1965, to discuss the proposed classification (Arb. Tr. p. 185). Vice-President Guy Rorabaugh, acting as spokesman for the Company, contended that painting was only an intermittent "catch-up" job, and did not constitute full-time work for anyone (Arb. Tr. p. 187). Rorabaugh

represented to the Union that the Company had no full-time painters (Arb. Tr. p. 187). Rorabaugh further stated that he objected to the Union's painter classification proposal because he did not want any jobs that weren't being filled (Arb. Tr. pp. 188, 200, 211). At the very time Rorabaugh made these representations the Company had Zimmer in its employ as a full-time painter at its Brawley plant without the Union's knowledge. In this context both the painter classification proposal made by the Union and the spray painter classification proposal made by Rorabaugh at the subcommittee meeting were taken to the main bargaining table. Here the painter proposal was dropped by the Union in reliance on Rorabaugh's representations, and the spray painter proposal was adopted (Arb. Tr. p. 198).

During the subcommittee discussion of Rorabaugh's counter proposal for a spray gun painter there was also discussion about just what work would be included in such a classification. Aside from actually handling the spray gun Rorabaugh agreed that there was also time involved in preparing, cleaning and taking care of the spray rig (Arb. Tr. p. 202). He agreed that the normal duties of a spray gun painter would be included in this classification (Arb. Tr. p. 209). According to this understanding, employees at the Company's Santa Ana plant occupying the painter (spray gun only) classification are paid for preparation and cleaning, as well as actual operation of the spray gun equipment (Arb. Tr. p. 190). In addition, Santa Ana employees are paid the rate of the spray

gun painter classification for the entire week whenever they perform the duties of that classification for a substantial part of a week (Arb. Tr. p. 190). This procedure is also followed at the Company's Hamilton City plant (Arb. Tr. p. 215). On the other hand, at the Brawley plant, where the instant dispute arose, the grievant (Zimmer) who had spent 65% of his time preparing and spraying (Arb. Tr. p. 34), had been paid the painter (spray gun only) classification rate only while he was actually handling the spray gun, and not while he was preparing, burning or scraping (Arb. Tr. pp. 97, 112).

Shortly after a new local Union president had been elected at Brawley in January 1966 he was presented with a variety of grievances. Included was a grievance by Zimmer claiming he was not receiving adequate pay (Arb. Tr. p. 84). The new Union president discovered for the first time that Zimmer had never done anything except paint and prepare surfaces for painting (Arb. Tr. p. 85). A grievance on behalf of Zimmer was filed by the chairman of the local union grievance committee, complaining of a variety of contractual violations, but specifically that Zimmer was misclassified:

> It is the contention of this Union that, the assignment of the position of mechanics helper does not, in any way, reflect the true classification that should presently be assigned to the incumbent painter. (R. Vol. 1, p. 46).

At the grievance committee meeting which followed, the Union argued that a painter classification should

be posted and filled since it was now clear that Zimmer was working as a painter during all of his working hours (Arb. Tr. p. 115). The Company contended that it has "no grounds" for filling a painter classification (Arb. Tr. pp. 115, 119).

With certain exceptions to be discussed later, the issues presented to this Court by the appellant were the same issues presented to the Arbitrator at the hearing, argued thereafter by the parties, and decided by the Arbitrator. The Union raised the issue that the Company had unilaterally established a new job of painter and was bound under the provisions of Section XVII(2) of the collective bargaining agreement to either negotiate or arbitrate the proper work classification and wage rate for the job performed by Zimmer. Section XVII(2) was first included in the 1962 collective bargaining agreement, and continued in the 1965 agreement. It provides as follows:

> In the event any new jobs are created, the work classifications and wage rates therefor shall be negotiated by the Employer and the Union, provided, however, should the parties fail to agree on the work classifications and wage rates for any such new jobs, the Employer shall have the right to fill such new jobs and fix the work classifications and wage rates therefor, *subject to the Union's right to refer the matter of the work classifications and wage rates of such new jobs to normal grievance procedure.* (R. Vol. 1, pp. 12, 29; emphasis supplied).

The Union also raised the issue that the new classification of "Painter (spray gun only)" under the 1965

contract was being incorrectly applied at the Brawley plant. The Union maintained that the Company had the obligation to post and fill this new classification because Zimmer was spending most of his time working as a spray gun painter. It was the Union's position that since Zimmer was working as a spray painter during a substantial majority of his working hours, he should be compensated as a spray painter, on a full-time basis.

Not once, prior to the arbitration hearing did the Company urge, as appellant now argues to this Court, either (1) that the 30 day proviso in Section XI(B) was applicable to preclude arbitration; or (2) that any claim for work performed under the 1962 collective bargaining agreement could no longer by processed through arbitration because that agreement had expired and had been superseded by the 1965 collective bargaining agreement. Indeed, it is quite clear that the Company's position prior to arbitration was not that the grievance was in any way untimely, but only that a "painter classification" had been "rejected" at the 1965 negotiations (Arb. Tr. pp. 150-151).

At the arbitration hearing, in addition to the contention that a painter classification had been rejected at the 1965 negotiations, and therefore could not be "added to the contract", counsel for the Company also belatedly added the issue of timeliness and presented these issues to the arbitrator at the hearing. It was also argued that if the Company had added a new job of painter in 1964, that it no longer could be considered a "new job", but now had the status of an "old

job".[2] Finally, counsel for the Company raised and submitted to the arbitrator for his determination the broad question of arbitrability.

At the arbitration hearing the Company asked the arbitrator to determine his own jurisdiction, and then decide the case on the merits. The Union agreed to submit the question of arbitrability to the arbitrator, but a conflict between the parties arose as to when the arbitrator should render his determination on the arbitrability question. Arbitrator Burns felt that he could not render a decision on that question without hearing evidence. Counsel for the Company "for the record" objected, but agreed that the arbitrator should have the *power* to rule on the question of arbitrability (Arb. Tr. p. 21, lines 16-26; p. 22, lines 1-10; p. 23, lines 19-24).

In his opinion and award, Arbitrator Burns found that since 1964 Zimmer had devoted himself exclusively to painting (R. Vol. 1, p. 56). He also found that the Company established a new job when it hired Zimmer in 1964, and was obligated under the terms of Article XVII(2) of the 1962 contract (quoted infra p. 8, as well as under Article VIII-G to post the new job and to negotiate and bargain with the Union as to an applicable wage rate (R. Vol. 1, p. 56). He held that the Company violated Section VIII-G of the 1962 contract, by failing to provide the Union with notice prior to the filling of the job. Thus, since the Company had failed to meet its obligations under the

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[2]The Company has evidently abandoned this issue in the presentation of its appeal.

contract, the time limitations contained in the contracts had been tolled (R. Vol. 1, pp. 57, 58). The arbitrator also found the grievance to be continuing, thus rendering the contract time limitations inapplicable, but because the Company had not complied with the contract he believed it was not necessary to base the decision on this ground.

Arbitrator Burns went on to hold that although the 1962 contract had been superseded by a new contract, there was no bar in the contract or in law or equity to prevent the consideration of claims under an expired contract in such circumstances as existed in this case (R. Vol. 1, p. 58).

Arbitrator Burns then resolved the remaining issue before him. He held that the "Painter (spray gun only)" classification established by the 1965 contract must be considered to have the content and scope of duties normally attributed to that job and the trade in which that job falls. He found that the new classification included the preparing of surfaces by way of brushing and cleaning, as it is a normal part of the responsibility of a painter, whether he sprays, brushes or rolls the surface with a protective coating. The arbitrator decided that there was nothing in the agreement or the record before him to indicate that these normal duties were intended to be excluded from the classification "Painter (spray gun only)" (R. Vol. 1, p. 60).

Arbitrator Burns then concluded that pursuant to his powers under Section XVII-2 of the contract Zimmer should receive pay in the classification of

Technician A from the time he was employed in 1964 and for the entire period while he worked either as a painter or as a spray gun painter.

ARGUMENT

I.

THE LAW AND COURT DECISIONS APPLICABLE TO THE ENFORCEMENT OF ARBITRATION AWARDS ARISING UNDER SECTION 301 OF THE LMRA (29 U.S.C.A. § 185(a)) REQUIRES THAT THIS APPEAL BE DISMISSED.

As is now well established, the authority of the federal courts to compel arbitration, to confirm arbitration awards, and their limited authority to vacate such awards, is derived from Section 301(a) of the Labor-Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C.A. § 185(a), and the interpretation thereof by the United States Supreme Court. *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 1 Law Ed. 2d 972, 77 Supreme Court 912; *United Steelworkers of America v. Warrior and Gulf Nav. Co.,* 363 U.S. 574, 4 L. Ed. 2d 1409, 80 S. Ct. 1347; *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 4 L. Ed. 2d 1403, 80 S. Ct. 1343; *United Steelworkers v. Enterprise Wheel and Car Corp.,* 363 U.S. 593, 4 L. Ed. 2d 1424, 80 S. Ct. 1358.

The Appellant argues that this Court should entertain an in depth review of arbitration proceedings. In *United Steelworkers v. Enterprise Wheel, supra,* the Supreme Court specifically rejected such a review. In so doing, the Court reversed a Court of Appeals de-

cision and reaffirmed an arbitrator's award, requiring reinstatement and back pay for discharged employees, subsequent to the termination of a collective bargaining agreement. The decision of the Court included the following analysis of its role and that of the arbitrator in the collective bargaining situation:

> *The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.* As we stated in *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 4 L. Ed. 2d 1409, 80 S. Ct. 1347, decided this day, the arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.
>
> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. (*Enterprise Corp., supra,* 363 U.S. 596, 597; emphasis supplied.)

As is the case with the appellant here, all too often a party seeking to avoid the unfavorable results of a

labor arbitration award will emphasize language in the *Enterprise* opinion, stating:

> ". . . the award is legitimate only so long as it draws its *essence* from the collective bargaining agreement. When the Arbitrator's words *manifest* an *infidelity to this obligation,* courts have no choice but to refuse enforcement of the award." (*Enterprise Corp., supra,* 363 U.S. 596, 597; emphasis supplied.)

The quotation of this language for the purpose of attacking the merits of an award is a misapplication of the true purpose of the trilogy decisions, which purpose is abundantly clear on careful reading. The *Steelworkers* trilogy decisions call upon the arbitrator to apply his specialized knowledge to the unexpected situation, which, not surprisingly, is the rule rather than the exception in labor relations. The courts have made it plain that the Arbitrator's "fidelity to his obligation" is always fully met so long as the arbitrator does not act in a clearly arbitrary or capricious manner in rendering an award which manifestly goes beyond his authority under the broad confines of the collective bargaining agreement. This is the true *essence* of the national labor policy as construed by the courts in considering labor arbitration agreements and awards. Scores of decisions have followed the trilogy cases discussing, reaffirming, and only in a very few instances, reassessing the court's involvement.

One of the issues raised by the appellant concerns alleged procedural irregularities in bringing this dis-

pute to arbitration. In case after case the courts have ruled that questions of compliance with the contract grievance procedures are to be exclusively determined by the arbitrator. *U.A.W. v. Daniel Radiator Corp. of Texas* (CA-5; 1964) 328 F. 2d 614; *AVCO Corp. Electronics and Ordnance Division v. Mitchell* (CA-6; 1964) 336 F. 2d 289; *Local 748, etc. v. Jefferson City Cabinet Co.* (CA-6; 1963) 314 F. 2d 192, cert. den. 377 U.S. 904, 84 S. Ct. 1162, 12 L. Ed. 2d 175; and *Livingston v. John Wiley & Sons* (CA-2; 1963) 313 F. 2d 52, aff'd 376 U.S. 543, 84 S. Ct. 909, 11 L. Ed. 2d 898.

The Supreme Court's opinion in *Livingston v. John Wiley & Sons, supra,* is particularly appropriate in view of the issue of contract time provisions raised by the appellant in these proceedings.

> "We think that labor disputes of the kind involved here cannot be broken down so easily into their 'substantive' and 'procedural' aspects. Questions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it.
>
> . . . .
>
> "Reservation of 'procedural' issues for the courts would thus not only create the difficult task of separating related issues, but would also produce frequent duplication of effort." [14 L. Ed. 2d 909.] *Livingston v. Wiley, supra,* at p. 558.
>
> . . . .
>
> "We think it best accords with the usual purposes of an arbitration clause and with the policy be-

> hind federal labor law to regard procedural disagreements not as separate disputes, but as aspects of the dispute which called the grievance procedures into play." *Livingston v. Wiley, supra,* at p. 559.

The courts have further held that the question of arbitrability itself when submitted to the arbitrator is normally a question which the arbitrator has the responsibility to decide. *Local 24 (IBEW) v. Bloom & Co.* (D.C. Md.; 1965) 242 F. Supp. 421. In *Local Lodge No. 595 of District No. 152 v. Howe Sound Co., Inc.* (CA-3; 1965) 350 F. 2d 508, the Court held that the question of holiday pay which accrued and was payable after the expiration of the collective bargaining agreement, was a matter to be determined by the arbitrator alone. Similarly, in *Piano and Musical Instrument Workers Union v. Kimball Co.* (No. Dist. Ill.) 221 F. Supp. 461; (reversed 333 F. 2d 761; cert. granted and judgment on appeal reversed, 379 U.S. 357), the Court held that questions of seniority and hiring provisions which arose after a contract had expired were arbitrable.

A similar result was also reached in *Monroe Sander Corp. v. Livingston* (CA-2; May, 1967) 377 F. 2d 6, cert. den. 389 U.S. 831, where the Court held that questions concerning the shut-down and transfer of plant operations to a new plant not directly owned by the defendant company were arbitrable, although the collective bargaining agreement had expired.

In *Local 7-644 Oil. Chem. & Atomic Int. Union, AFL-CIO v. Mobil Oil Co.* (CA-7; 1965) 350 F. 2d

708, the Court held that questions concerning vacation benefits which arose during an extended six months strike, but prior to the execution of a new contract, were arbitrable. The Seventh Circuit Court of Appeals went on to say:

> "The District Court erred in considering afresh the merits of the dispute submitted for arbitration. Even though we might disagree with the arbitrator's decision if we were to examine the merits of the dispute, there is nothing in the record to indicate that the award was arbitrary or that the arbitrator exceeded his authority." *Local 7-644 v. Mobil Oil Co., supra,* at pp. 711-712.

This Court has also had occasion to discuss the question of proper judicial involvement after an arbitration award has been rendered.

In *Ficek v. So. Pac. Co.* (CA-9; 1964) 338 F. 2d 655, the plaintiff employee, as an individual, sued the Southern Pacific Company for a breach of an employment contract. The Company had promised to reinstate the employee if he underwent back surgery, which he did. Following the back surgery, and following the certification of his physical fitness, the Company refused to return the claimant to work. The matter was submitted to arbitration and the employee lost. This Court affirmed the trial Court's order granting the company's motion for summary judgment on the grounds that the arbitration award was "final and binding upon both parties to the dispute". The Court went on to discuss its powers in overturning final and binding arbitration awards:

> Ficek relies upon the statement in *Bower v. Eastern Airlines,* 214 F. 2d 623, 626 (3rd Cir. 1954), that "the essential fairness" of the arbitration proceeding is subject to judicial examination. But this means only that the court may decline to recognize an award if the arbitration proceeding does not meet minimal requirements of fairness—notice, "a full and fair hearing", and a decision based on the "honest judgment" of the arbitrators. It does not mean that the award may be examined for "alleged mistakes of law and erroneous evaluation of evidence". 214 F. 2d at 626-627. In effect, Ficek asks the court to review the substantive fairness of the award on the merits. That the court may not do. *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 596, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960)." *Ficek v. Southern Pacific Company, supra,* at p. 657.

The case of *American Radiator & Stand. San. Corp. v. Local 7 of the International Bro. of Operative Potters* (CA-6; 1966) 358 F. 2d 455, is particularly relevant here because of the appellant's contention that the creation of a new job was strictly a prerogative of management, and therefore not arbitrable. The Court disagreed, and ordered arbitration.

> "It is not the province of the courts to determine issues of fact which bear upon the questions of whether a particular section of the contract has been violated. This is the function of the arbitrator. *United Steelworkers of America v. American Manufacturing Co.,* 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403. It is therefore our opinion that the question of whether new jobs have been

created is an issue of fact which bears upon the issue of whether there has been a contract violation as charged by the union."

The United States Supreme Court in its holding in *Lincoln Mills, supra,* that Section 301(a) of the LMRA required the courts to enforce arbitration under collective bargaining agreements declared that it was the duty of the courts "to fashion a body of federal law" in implementation of this holding. Since then both the various state courts and the federal courts have been endeavoring to comply with this injunction. In so doing it is becoming increasingly clear that the courts are turning for assistance to the law of the forum.

Many states, including California where this case arose, have statutes governing arbitration which severely limit judicial review. The California statute on arbitration is similar to statutes found in most jurisdictions, as well as being almost identical to the language of the United States Arbitration Act (9 U.S.C. § 10). The California Code of Civil Procedure requires that an arbitration award may be vacated only under the following limited circumstances:

"CCP 1286.2.

Subject to Section 1286.4, the court shall vacate the award if the court determines that:

(a) The award was procured by corruption, fraud or other undue means;

(b) There was corruption in any of the arbitrators;

(c) The rights of such party were substantially prejudiced by misconduct of a neutral arbitrator;

(d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted; or

(e) The rights of such party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title. (Added Stats. 1961, c. 461, p. 1546, § 2.)

The California courts have long recognized the statutory restrictions on the review of arbitration awards and they have exercised their limited jurisdiction with extreme caution. Among the leading California cases are the following: *Sapp v. Barenfeld,* 34 C. 2d 515; *Pacific Vegetable Oil Corp. v. C.S.T. Ltd.,* 29 C. 2d 228; *Loving & Evans v. Blick,* 33 C. 2d 603; *Crofoot v. Blair Holdings Corp.,* 119 C.A. 2d 156; *L.A. Joint Executive Board of Culinary Workers & Bartenders v. Stan's Drive-Ins, Inc.,* 136 C.A. 2d 89; *O'Malley v. Petroleum Maintenance Co.,* 48 C. 2d 107; *Atlas Floor Covering v. Crescent House & Garden, Inc.,* 166 C.A. 2d 211; *Ulene v. Millman (Murray) of Calif., Inc.,* 175 C.A. 2d 655; *Grunwald-Marx, Inc. v. Los Angeles Joint Board* (1959) 52 C. 2d 568; *Turner v. Cox,* 196 C.A. 2d 596; *Interinsurance Exchange v. Bailes,* 219 C.A. 2d 834.

Since the Supreme Court decisions in *Lincoln Mills* and the *Steelworkers* trilogy, California has recognized that federal law under Section 301(a) of the LMRA is applicable to arbitration under collective bargaining agreements between parties in industries affecting interstate commerce. In applying that law at least one California court has already held that the statutory procedures for arbitration provided for in California law are compatible with the federal labor policy under Section 301(a). *Laufman v. Hall-Mack Co.,* 215 C.A. 2d 87. Other states have also followed this view. A recent decision emanating from the Supreme Court of Minnesota also holds that its state arbitration act is consistent with substantive principles of federal labor law and should be applied to the enforcement of all awards. *Fischer, et al. v. Guaranteed Concrete Co.* (May 19, 1967) CCH Lab. Cases, ¶11,933, p. 19,074, at 19,076.

The United States Supreme Court has also recently applied state statutory procedural law in connection with enforcement of arbitration agreements governed by Section 301(a) of the LMRA. In *U.A.W. v. Hoosier Cardinal Corp.,* 383 U.S. 696 (1966) the Supreme Court found an Indiana statute of limitations applicable to LMRA Section 301 suits. The Court stated:

> "Accordingly since no federal provision governs we hold that the timeliness of a Section 301 suit such as the present one is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." *U.A.W. v. Hoosier Cardinal Corp., supra,* at pp. 696-697.

As the Supreme Court pointed out, no federal statutory provisions govern the consideration of arbitration agreements and arbitration awards arising under LMRA Section 301(a). It is respectfully suggested that in exercising its duty to fashion a body of law for this purpose, this Court has in the California arbitration statute quoted above a ready and compatible source for the development of such law in this jurisdiction in connection with the review of arbitration awards governed by LMRA Section 301(a). Consistency of judicial enforcement and the desirable objective of settled law is well served by application of the law of the forum in both the state and federal courts.

To the extent that the appellant here urges a broad or exhaustive judicial review, we submit that appellant would be foreclosed by the California statute, and the court decisions in California arising thereunder, were it to move to vacate this award in the California courts. No case in any jurisdiction, to our knowledge, holds that the appellant should receive more highly favored treatment or have a lesser burden in the federal courts than is available to it under the state arbitration statute.

II.

APPELLANT HAS FAILED TO ESTABLISH ANY BASIS IN LAW OR FACT FOR A JUDICIAL VACATION OF THE ARBITRATOR'S AWARD HEREIN.

The appellant seeks to prevail upon this Court to overturn the arbitration award on the grounds that the grievance filed was not within the 30 day limita-

tion contained in the contracts. As already noted, application of the 30 day limitation is a question of procedural arbitrability, and all procedural questions are solely for the arbitrator's determination (see *Wiley v. Livingston,* and other cases cited *supra*). The arbitrator, of course, carefully considered the applicability of the 30 day limitation. He found that the Company had violated both the 1962 contract and the 1965 contract by failing to notify the Union of the establishment of the new painter classification and that the time limitations were, therefore, tolled. This was manifestly a fair and reasonable interpretation of the contract, and it was beyond any question within the arbitrator's powers to so decide.

The Union argued during the arbitration that the Company's procedural defenses could have been disposed of by the arbitrator on the grounds of waiver. Ample evidence in the arbitration record supported the proposition that the Company had waived the 30 day limitation by failing to raise it during the grievance committee meetings (Arb. Tr. pp. 150-151). Arbitration authority would have supported such a decision on waiver grounds. See: *Walter Refractories, Inc.,* 22 LA 775; *Cherry Growers, Inc.,* 24 LA 232; *Kroger Co.,* 24 LA 573; *McLouth Steel Corp.,* 24 LA 761; *American Smelting & Refining Co.,* 24 LA 857; *Flexonics Corp.,* 24 LA 869; *Denver Post,* 41 LA 200.

The Union also argued the principle of "continuing grievances." Labor arbitrators and the courts have long recognized that continuing violations of collective bargaining agreements are arbitrable on their

merits, regardless of time limitations for filing grievances under the contract. *Livingston v. Wiley, supra.*

Numerous arbitration decisions have supported this view: *Sargent Engineering Corp.,* 43 LA 1157; *Steel Warehouse Co., Inc.,* 45 LA 357; *Avco Corporation,* 43 LA 765; *Bethlehem Steel Co.,* 33 LA 324; *Paragon Bridge & Steel Co.,* 35 LA 572; *U.S. Potash Co.,* 37 LA 442; *ACF Industries,* 38 LA 14; *Copolymer Rubber & Chemical Corp.,* 40 LA 923.

The Union also urged the well-recognized concept of estoppel. Factory Superintendent Scanlan went out of his way to prevent the Union from learning of the new job that he had established. The Union was never notified and payroll records failed to indicate that Zimmer was a full-time painter. During the 1965 negotiations when the Union asked the Company to submit a list of active classifications, the other factory managers complied, but Scanlan failed to list the grievant Zimmer as a painter. Then, finally, during the 1965 negotiations when a full-time painter classification was squarely in issue, the Company negotiators misrepresented the situation by telling the Union that it had no full-time painters, and no need for any.

Thus, the arbitrator had several sound bases upon which to determine that the time limitations contained in the contract were not a valid defense to the grievance charged. The arbitrator chose to conclude that the Company's failure to notify the Union of the establishment of a new classification was a condition precedent to the assertion of the limitation defense.

> "Since the Company failed to comply with its obligations under the 1962 contract which would have had the effect of putting the Union on notice of the employment of Zimmer and the establishment of a job that consisted exclusively of painting and work in connection with painting, the 30 day limitation of both the 1962 and the 1965 contracts was tolled until knowledge or information was received by the Union which would have the effect of putting the Union on notice. This knowledge was not received until the early part of 1966, when the grievance here under consideration was filed." (R. Vol. 1, pp. 57, 58.)

This, of course, is the crux of the dispute between the Company and the Union, the merits of which were determined by the arbitrator. The Company contended that it has no obligation to inform anybody when it establishes a new job. Its peculiar theory is that if a new job is instituted and remains in existence for more than thirty days it can retain the new job with a *unilaterally* assigned wage rate *ad infinitum*. Indeed, after the passing of 30 days the Company euphemistically characterizes new jobs as "old jobs". The arbitrator had exclusive authority to determine this issue on its merits and did so. Nevertheless, the appellant now seeks to have this Court reverse the arbitrator.

In 1964, Brawley factory manager Scanlan, for reasons best known to himself, chose to violate *specific contractual provisions* concerning new jobs, hired a journeyman painter to do nothing but paint and classified him as a "Mechanic's Helper". Scanlan

acted secretly to enter into an illegal individual contract with a man in need of a job. There has never been any serious question that the assigned Mechanic's Helper classification was a patent violation of the agreement, and the arbitrator so found. Scanlan's action when he hired Zimmer in 1964 and his behavior thereafter constituted active concealment.

Arbitrator Burns could not ignore Scanlan's patent violation or the secrecy involved. With full knowledge of the entire circumstances, Arbitrator Burns thus ruled that the grievance time limitations of Section XI of the 1962 contract were tolled until the Union had been fairly apprised of these circumstances. Despite all of the overwhelming evidence that Scanlan's entire course of conduct constituted clear concealment, the Company still urges this Court to conclude that Arbitrator Burns' award was "baseless" and "inconsistent" since on page 9 of his award Arbitrator Burns observed:

> "There is evidence that prior to and during the 1965 negotiations Union representatives observed Zimmer performing painting work. It is clear that much of his work was in full view of other employees or any observer." (R. Vol. 1, p. 55.)

It should be noted that the above statement was in the section of the arbitrator's award entitled "Review of the Evidence". At the end of this section the arbitrator states that other evidentiary matters are mentioned in his opinion. In his opinion the arbitrator makes a specific finding that the Company failed to notify the Union of the creation of this job and that

it failed to post the job, all in violation of Sections XVII-2 and VIII-G of the 1962 contract.

It is important to point out that Arbitrator Burns did not conclude and did not find that before the grievance was filed the Union had notice of the scope and character of Zimmer's painting activities. In their opening brief, counsel for the Company have continuously misstated the arbitrator's finding in this regard.

It is true there was some evidence that Zimmer had been observed doing painting work by some persons, but it is also clear from the record that all "mechanic's helpers" on some occasions did some painting work. There is no evidence in the record that any Union representatives knew that Zimmer was performing painting work *exclusively,* and no such finding could have been supported. Nor did Arbitrator Burns indicate that the fact that Zimmer's work was "in full view of other employees" in any way offset the Company's obligation to notify the Union and post the newly established job. Plainly, the arbitrator's award was entirely reasonable and represented his honest judgment after a careful review of all of the evidence.

For the first time the Company, in this appeal, has added an additional argument concerning the relationship between Sections VIII-G and XVII-2 of the contract. Their contention is that the notice and posting requirements of Section VIII-G are subservient to Section XVII-2. It is now the Company's belated contention to this Court that there is never an obligation

to notice and post a new job created under Section XVII-2. Aside from the fact that this is a novel proposition never presented to the arbitrator in these proceedings, nor to the Court below, this is clearly a question of contract interpretation involving the arbitrator alone.

III

THE FACT THAT A PORTION OF THE ARBITRATOR'S AWARD CONCERNED A PRIOR AND SUPERSEDED COLLECTIVE BARGAINING AGREEMENT PROVIDES NO BASIS IN THE CIRCUMSTANCES OF THIS CASE FOR THE RELIEF SOUGHT BY APPELLANT.

There can be little dispute today that under the applicable law labor arbitration awards may be issued pursuant to and in interpretation of expired collective bargaining agreements. See *United Steelworkers of America v. Enterprise Wheel & Car Corp., supra; Local 7-644, Oil & Chemical Atomic Workers International Union v. Mobil Oil Co., supra; Piano & Musical Instrument Workers Union v. Kimball Co., supra; Zedanok v. Glidden Co.* (CA-2; 1961) 288 F. 2d 99; *Local Lodge No. 595 of District No. 152 v. Howe Sound Co., supra; Monroe Sander Corp. v. Livingston, supra.* The power of arbitrators to issue awards pursuant to expired collective bargaining agreements is derived from the policy of the national labor laws to encourage voluntary settlements and thereby encourage the promotion of peace and stability in the collective bargaining relationship. Ordinary contract law may in some civil cases preclude

arbitration under an expired agreement, but a collective bargaining agreement is not an ordinary contract and not to be interpreted according to ordinary contract law. *General Warehouse & Employees Union, No. 636 v. American Hardware Supply Co.* (CA-3; 1964) 329 F. 2d 789, 793.

Fully aware that the law empowering arbitrators to issue awards applying the terms of expired contracts is beyond question, the Company's entire thrust *since the arbitration award was rendered* has been that the parties never "agreed" to submit any issue to the arbitrator relating to the 1962 collective bargaining agreement. Seeking to buttress this after-the-fact contention the Company quotes from Sections XI-C and XI-D of the contract and from some of the arbitrator's preliminary remarks in the transcript before he was fully apprised of the issues.

The Company significantly omits to point out that subsequent to the arbitrator's opening remarks at the hearing, counsel for the Union and the Company engaged in an extensive dialogue (Arb. Tr. 4-27), wherein the entire question of arbitrability under both the 1962 and the 1965 contracts was *submitted* to the arbitrator for his resolution.

> The Arbitrator: Well, I think I have an understanding now of the issues. In any event *the Company is raising the issue* that the dispute is not arbitrable.
>
> Mr. Clinton: *That is correct.*
>
> The Arbitrator: *So it will be necessary to decide that. And the other two issues will follow if there is an affirmative finding with respect to*

issue No. 1 [the question of arbitrability] *as stated in your letter.*

Is that correct?

Mr. Clinton: *That is correct.* (Arb. Tr. p. 14, lines 1-9.)

. . .

Mr. Clinton: The contract is clear that the arbitrator has no authority to deal with the events prior to the time of this contract.

Mr. Davis: We don't agree with that.

The Arbitrator: *That is a subsidiary question that will have to be determined in the course of the proceedings or at the conclusion of the proceedings,* because I am sure that Mr. Davis will raise the issue by the offered evidence. (Arb. Tr., p. 14, lines 21-26; p. 15, lines 1-5. Emphasis supplied.)

Thus, it is clear beyond any dispute that the question of arbitrability of the existence of a painter classification under both the 1962 and the 1965 contract was a question submitted to the arbitrator for his determination. The arbitrator's authority to act on the question was derived from the submission of both counsel at the hearing. Since *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* it is clear that all issues submitted to the arbitrator, *including the question of arbitrability,* may be submitted and resolved finally by the arbitrator. See *United Steelworkers v. Warrior & Gulf, supra,* 363 U.S. 583 (footnote 7). See also: *Local 24 (IBEW) v. Bloom Company, supra; A. S. Abell Company v. Baltimore Typographical Union No. 12* (CA-4; 1964) 338 F. 2d 190.

Every issue in the case, including interpretation of the contract in all particulars and arbitrability of the disputes under the 1962 and the 1965 contracts, were thus clearly submitted to the arbitrator without reservation for his determination. The contract language stating that "the decision of the Arbitrator shall be in writing and shall be final and binding upon both parties" (R. Vol. 1, page 12 [c.b.a. 26]; R. Vol. 1, p. 24) precludes subsequent judicial inquiry into arbitrability where the question of arbitrability has been submitted to an arbitrator for his determination. This Court now is without authority to review the arbitrator's determination on all issues submitted, unless the arbitrator's conclusions were demonstrably not based upon his "honest judgment." *Ficek v. So. Pac. Co., supra.*

In view of the submission of all issues to the arbitrator and in view of the flagrant contractual violations on the part of the Company found by the arbitrator, his remedy in awarding Harold Zimmer back pay was entirely justified. It is appropriate to observe parenthetically, that Arbitrator Burns is among the most distinguished and articulate arbitrators in this region, and he was chosen by the parties here to be a member of their arbitration panel by mutual agreement and has regularly served them in that capacity in many other cases. A careful reading of his award discloses that it is in no sense capricious or arbitrary. Rather, the award represents a genuine good faith effort on the part of Arbitrator Burns to resolve a difficult dispute, which the parties had voluntarily consigned to him for a final decision.

CONCLUSION

The right to a final and binding arbitration is a right set forth in the parties' collective bargaining agreement, and the right to a summary confirmation of an arbitration award is a right arising under Section 301 of the Labor-Management Relations Act. For the reasons stated above and supported by the entire record herein, it is respectfully submitted that the United States District Court for the Northern District of California correctly found that the arbitration award herein should be confirmed. The appeal therefrom should be dismissed.

Dated, San Francisco, California,
May 10, 1968.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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